(1)

Supreme Court, U.S.
FILED

No. _____ 06-391 SEP 14 2006

OFFICE OF THE CLERK

In The Supreme Court of the United States

ELBERT LEON GRAHAM, JR.,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Virginia

---

PETITION FOR A WRIT OF CERTIORARI

Roland M. L. Santos, Esquire
Attorney at Law
52 East Market Street
Harrisonburg, Virginia 22801
(540) 434-2211

Counsel for Petitioner

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

QUESTION PRESENTED

Does the petitioner's inability to understand the Miranda Warning, due to his condition at the time of arrest, invalidate the warning by the police producing an involuntary and constitutionally inadmissible statement?

PARTIES TO THE PROCEEDING

All parties to this proceeding are named in the Caption.

TABLE OF CONTENTS

QUESTION PRESENTED.....2

PARTIES TO THE PROCEEDING.....3

TABLE OF AUTHORITIES.....5

OPINIONS BELOW.....6

JURISDICTIONS.....6

CONSTITUTIONAL AND STATUTORY PROVISIONS ..6

STATEMENT OF THE CASE.....7

(i)Proceedings in the Courts Below.....7

(ii)Statement of Facts.....7

REASONS FOR GRANTING THE PETITION.....8

ARGUMENT.....9

1. PETITIONER'S INEBRIATION AT THE MOMENT OF HIS ALLEGED CONFESSION MADE HIM UNABLE TO UNDERSTAND HIS RIGHTS DESPITE *MIRANDA* WARNINGS.

CONCLUSION.....21

TABLE OF AUTHORITIES

Cases **Page**

Arizona v. Fulminante, 499 U.S. 297 (1991).....13, 14, 20

Blackburn v. Alabama, 361 U.S. 199 (1960).....12

Brown v. Mississippi, 297 U.S. 287 (1936).....10

Colorado v. Connelly, 479 U.S. 157 (1986)..... 8, 12, 19

Dickerson v. United States, 530 U.S. 428 (2000).....9

Miller v. Fenton, 474 U.S. 104 (1985).....14, 15

Missouri v. Seibert, 542 U.S. 600 (2004).....15, 16, 20

Moran v. Burbine, 475 U.S. 412 (1986).....9, 16, 17, 20

Rochin v. California, 342 U.S. 165(1952).....11, 21

Strobel v. California, 343 U.S. 181 (1952).....12

Townsend v. Sain, 372 U.S.293 (1963).....11, 20

United States v. Cristobal, 293 F. 3d 134
(4th Cir. 2002).....17, 18, 19, 20

Watts v. Indiana, 338 U.S. 49 (1949).....10

OPINIONS BELOW

The opinion of the Court of Appeals of Virginia of June 29, 2005 is unpublished and is reprinted as Appendix A hereto at 1A. The Denial of the Petition for Appeal by the Supreme Court of Virginia was issued on May 2, 2006, reprinted as Appendix B, hereto at 1B. The Denial of the Petition for Rehearing by the Supreme Court of Virginia was issued on June 16, 2006, reprinted as Appendix C, hereto at 1c.

JURISDICTION

The Court of Appeals of Virginia entered its decision on June 20, 2005. The Supreme Court of Virginia denied Petitioner's Petition for Appeal on May 2, 2006. The Supreme Court of Virginia denied Petitioner's Petition for Rehearing on June 16, 2006. This Petition is filed within the time frame prescribed by Rule 13 of the Rules of the Supreme Court. Petitioner seeks to invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1254, 1257.

STATUTE INVOLVED

The Petitioner was convicted in a bench trial of Possession of a Firearm by a Convicted Felon, in violation of Virginia Code Section 18.2-308.2. The alleged violation of the United States Constitution concerns the Fifth, Sixth, and Fourteenth Amendments. See Appendices D and E.

STATEMENT OF THE CASE

(i) Proceedings in the Courts Below

Following a one day bench trial in the Circuit Court of Augusta County, Commonwealth of Virginia, before Judge Thomas H. Wood. Petitioner Elbert Leon Graham, Jr. was convicted of one count of Possession of a Firearm after being convicted of a Felony on May 14, 2004. On October 21, 2004, Petitioner was sentenced to five (5) years in the state penitentiary, with three (3) of those years suspended. Petitioner argued that the facts were insufficient to support the conviction in the Court of Appeals of Virginia. The Court ruled that the evidence was sufficient for a conviction. This Court denied the Petitioner's Motion to Rehear. The Supreme Court of Virginia denied Petitioner's Petition for Appeal and subsequent Petition for Rehearing.

(ii) Statement of Facts

On July 16, 2003, Deputies Donald Arnold and Joel Good of the Augusta County Sheriff's Department, Augusta County, Virginia, responded to a discharged firearm complaint at the Petitioner's home. Deputy Good testified that Petitioner told him that he shot a gun. He further testified that he knew that Petitioner admitted to the other deputy where the gun could be found. The other deputy, Deputy Arnold, testified that he arrived at the Petitioner's house and first met the Petitioner's wife, interviewed her, and approached the Petitioner. Deputy Good testified that the Petitioner had been drinking. He said that the Petitioner told Deputy

Arnold that a firearm was in one of the cars on the Petitioner's property. Deputy Arnold recovered a pistol.

Both deputies swore that the Petitioner told the other where to find the firearm, the central factor in this case since the Petitioner was charged with a possession of a firearm after being convicted of a felony.

The Petitioner's wife, Karen Graham, testified that the Petitioner was extremely drunk, to the point of falling down. She testified that she told the police where to find the firearm. The Petitioner testified that he could not recall any events because he was, indeed intoxicated.

REASONS FOR GRANTING THE PETITION

Petitioner's argument raises the question of whether or not coercive police activity is a fundamental prerequisite to asserting a defective relinquishment of rights after being administered *Miranda* warnings, despite the Court's ruling in *Colorado v. Connolly*, 479 U.S. 157 (1986). Petitioner asserts that Due Process can invalidate confessions that are not knowing and intelligent where the police do no harm, despite *Miranda* and its progeny.

Petitioner offers a solution to the dilemma of the "voluntariness test" and the *Miranda* prophylactic rule, whereby in cases where the defendant has been given *Miranda* warnings, the defendant must show, by a preponderance of the evidence, that the confession is involuntary. In cases where there was no *Miranda* warning administered, or there is a question of police coercion, the government should bear the burden of proving the validity of the confession beyond a reasonable doubt to maintain fairness.

ARGUMENT

PETITIONER'S INEBRIATION AT THE MOMENT OF HIS ALLEGED CONFESSION MADE HIM UNABLE TO UNDERSTAND HIS RIGHTS DESPITE *MIRANDA* WARNINGS.

When the defendant asserts an invalid relinquishment of his rights after being administered the *Miranda* warnings, a court must prosecute this claim with a twofold analysis. First, the relinquishment of the right "must have been voluntary in this sense that it was a product of free and deliberate choice rather than intimidation, or coercion." *Moran v. Burbine*, 475 U.S. 412, 421 (1986). Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." Only if the "totality of the circumstances surrounding the interrogation' reveals both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived." *Id.*

In the 18th and 19th century, courts scrutinized over the admissibility of confessions as it related to meet the trustworthiness of evidence. Hence, confessions were often admissible so long as they were free from influence which made them untrustworthy or "probably untrue." See generally C. McCormick, *McCormick on Evidence* 226 (1954); 3 J. Wigmore, *Evidence* § 822 (3d.ed 1940). As stated by this Court in *Dickerson v. United States*, 530 U.S. 428, 433 (2000);

> "Prior to *Miranda*, [we] evaluated the admissibility of a suspect's confession under

> the voluntariness test. The roots of this test developed in the common law, as the courts of England and in the United States recognized the worst confessions are inherently untrustworthy."

Until *Miranda*, "Due Process" or "voluntariness" had three underlying values or goals. This somewhat amorphous "rule" barred admission of confessions (a) which were of doubtful reliability because of the police methods used to obtain them; (b) which were produced by offensive police methods even though the reliability of the confession was not in question; and (c) which were obtained from a person whose delusional power seriously impaired him, even though the confession was entirely trustworthy and not the product of conscious police wrongdoing. See: Yale Kasimer, William LaFave, & Jerry Israel, *Modern Criminal Procedure*, 519 (6d ed., West 1986).

At the outset, however, the primary basis for excluding confessions under the Due Process "voluntariness" test was the "untrustworthiness" rationale. Rules governing confessions were designed merely to protect the integrity of the fact-finding process. This rationale is distinctly shown in the first Fourteenth Amendment "Due Process" confession case, *Brown v. Mississippi*, 297 U.S. 278 (1936), where police whipped the defendant to "elicit" a confession. However, police methods of extracting confessions gained sophistication in non-physical manners which did not abrogate the then legal caveat against the use of physical force, but were no less odious. As the Court stated in *Watts v. Indiana*, 338 U.S. 49 (1949),

> "In holding that the Due Process Clause bars police procedure which violates the basic notions of our accusatorial mode of prosecuting crime and vitiates a conviction based on the fruit of such procedure, we apply the Due Process Clause to its historic function of assuring appropriate procedure before liberty is curtailed or life is taken."

As enumerated in *Rochin v. California*, 342 U.S. 165, 72 S. Ct. 205, 96 L. Ed. 183 (1952),

> "Use of involuntary verbal confessions in state criminal trials is constitutionally obnoxious not only because of their unreliability. They are inadmissible under the Due Process Clause even though statements contained in them may be independently established as true. Coerced confessions offend the community's sense of fair play and decency."

Id. at 171.

The third prong of the pre-*Miranda* test was employed in *Townsend v. Sain*, 372 U.S. 293, 83 S. Ct. 745, (1963). There, the Court excluded a confession obtained from a defendant given a drug with the properties of truth serum. Although the police were unaware of the drug's effect and had engaged in no conscious wrongdoing, and even though the confession was apparently reliable, this Court excluded the defendant's confession, ruling that:

> "Any questioning by police officers which *in fact* produces a confession which is not the product of a free intellect renders that confession inadmissible."

The Court has so stated the test. See, *e. g., Stroble v. California,* 343 U.S. 181, 190 (1952). Where the Court held;

> "If the confession which petitioner made . . . was in fact involuntary, the conviction cannot stand . . . ."

The Court has further considered this ruling in *Blackburn v. Alabama,* 361 U.S. 199 (1960). Where they held that:

> "Irrelevant the absence of evidence of improper purpose on the part of the questioning officers. There the evidence indicated that the interrogating officers thought the defendant sane when he confessed, but we judged the confession inadmissible because the probability was that the defendant was in fact insane at the time."

Miranda initially pronounced a prophylactic rule barring admission of evidence if police failed to comply with the rote presentation of prescribed warnings and constitutional rights. However, from *Miranda*'s inception this Court recognized that Due Process is not necessarily gleaned by the strict observance of the *Miranda* rituals. This Court has agonized over cases where the real issue lay in the "voluntariness" of the confession, not the administration of the *Miranda* warnings.

In *Colorado v. Connelly,* 479 U.S. 157 (1986); the defendant approached a police officer and confessed to a murder. The officer advised him of his *Miranda* rights. The defendant said that he understood his rights and further confessed in detail. After his arrest, a psychiatrist evaluated the defendant and found that he suffered from a psychotic

condition, manifested in "command hallucinations" that interfered with his ability to make free and rational choices.

However, the psychiatrist further stated that the defendant's illness did not significantly impair his cognitive abilities. Defendant, therefore, could understand the police's *Miranda* warnings, but his psychotic condition motivated his confession. The trial court suppressed the statements because it ruled that they were made involuntarily. The Colorado Supreme Court agreed, stating that the test for the statement's admissibility is whether or not the statements are "the product of a rational intellect and a free will."

This Court reversed, stating that "absent police conduct casually related to the confession, there is simply no basis for concluding that any state actor has deprived criminal defendant of due process of law." *Id.* at 164.

In *Arizona v. Fulminante*, 499 U.S. 297 (1991), while investigating the murder of an 11 year old child, police paid an inmate at the defendant's prison to try to have the defendant confess to the murder. The informant then befriended the defendant.

The defendant told him that he was being badly treated because rumors spread within the prison that he had murdered the girl. The informant promised to help him, but on the condition that the defendant confess to him, which he eventually did, to his demise, resulting in his subsequent conviction. Agreeing with the lower court that the confession was the result of a coerced confession, this Court stated:

> "Our cases have made it clear that a finding of coercion need not depend upon actual threat of violence by a government agent; a credible threat is sufficient.... Coercion can

> be mental as well as physical; the blood of the accused is not the only hallmark of an unconstitutional inquisition.... [the defendant's] will was overborne in such a way as to render his confession the product of coercion."

Id at 297.

In *Miller v. Fenton*, 474 U.S. 104 (1985), this Court stated that

> "... Confession cases hold that the ultimate issue of "voluntariness" is a legal question requiring independent federal determination for purposes of federal habeas proceedings."

Id. at 110.

Here, the defendant, a suspect in a murder, voluntarily went to the police department and signed a proper *Miranda* waiver. During an hour long interview, the police lied to the defendant and told him that the victim's brother identified him by his clothing, and that blood stains were found at his house. This Court refused to limit its examination to claims that the police conduct was "inherently coercive."

It stated:

> "It applies equally when the interrogation techniques were improper only because, in the particular circumstances of the case, the confession is unlikely to have been the product of a free and rational will. Because the ultimate issue in both categories of cases is the same - whether the state has obtained the confession in a manner that comports with due

> process --- the decisions leave no doubt that our independent obligation to decide the constitutional question is identical."

Id. at 110

In *Missouri v. Seibert*, 542 U.S. 600 (2004), this Court tested the constitutionality of the new "question first" police interrogation tactic, whereby the police arrest a suspect, then interrogates the suspect, elicits a confession, then they Mirandize the suspect, and have the suspect repeat his confession. Technically, the second statement is admissible in court because it comes after administering a proper *Miranda* warning. This Court ruled that the tactic defiled Constitutional intent, stating:

> "Just as no talismanic incantation is required to satisfy *Miranda*'s structures, it would be absurd to think that mere recitation of the litany suffices to satisfy *Miranda* in every conceivable circumstance. The inquiry is simply whether the warnings recently convey to a suspect his rights as required by *Miranda*. The threshold issue when interrogators question first and warn later is thus whether it would be reasonable to find that in these circumstances the warnings could function effectively as *Miranda* requires. For the warnings effectively advise the suspect that he had a real choice about giving an admissible statement at that juncture? Could they reasonably convey that he could choose to stop talking even if he had talked earlier? For unless the warnings could place a subject who has just been interrogated in a

> position to make such an informed choice, there is no practical justification for accepting the formal warnings as compliance with *Miranda*, or for treating the second stage of interrogation as distinct from the first, unwarned and inadmissible segment."

Id. at 611-612.

The Court understood that the ploy set out to extract a confession without the warning, and obtain with certainty, its duplicate confession after administering the warning. However, this Court recognized that a suspect could hardly believe that he would have a genuine right to remain silent once the police began to beat him over the same ground again. This Court reasoned:

> "Thus, when *Miranda* warnings are inserted in the midst of coordinated and continuing interrogation, they are likely to mislead and deprive defendant of knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them."

Id. at 613-614.

In *Moran v. Burbine*, 475 U.S. 412 (1985), this Court dealt with the question of whether or not the Fifth Amendment was violated where police actively mislead a suspect, extract a confession from him, all while failing to inform him that he has an attorney. The family of the defendant retained counsel, who subsequently informed the

police that she represented the defendant. The police never told the defendant this, and interrogated him after giving him Miranda warnings. Defendant subsequently confessed, but claimed a Fifth Amendment violation. The Court disagreed, focusing primarily on the application of the *Miranda* warnings and the voluntariness of his statement, rather than the misleading police action. In so ruling, the Court confirmed that a Fifth Amendment "voluntariness" examination may be warranted despite the lack of police coercion:

> "The defendant may waive effectuation of the rights conveyed in the warnings provided the waiver is made voluntarily, knowingly and intelligently. The inquiry has two dimensions.... First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned in the consequences of the decision to abandon it. Only if the totality of the circumstances surrounding the interrogation reveals both an unforced choice and the requisite level of comprehension may court properly concluded that the *Miranda* rights have been waived."

Id. at 421.

In *U.S v. Cristobal*, 293 F. 3d 134 (4th Cir. 2002), the Court of Appeals correctly gleaned from the decisions of this Court that this prong of the Fifth Amendment

voluntariness analysis survived *Miranda* and the prophylactic rules of its progeny. Here, the defendant was interviewed by the police at the hospital shortly after he was shot. He was read his *Miranda* rights and was interviewed for an hour. The defendant communicated in English, his speech was not slurred, he never nodded off or slept, nor did he indicate in any way that he was under a narcotic stupor. Furthermore, the defendant never asked to stop the interview and his confession was very detailed:

> "The inquiry into whether an individual waives effectuation of the rights conveyed in the *Miranda* warnings has two distinct dimensions. First, the relinquishment of the right "must have been voluntary in the sense that it was the product of free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned in the consequences of the decision to abandon it. Only if the totality of the circumstances surrounding the interrogation revealed both an unforced choice and requisite level of comprehension may a court properly concluded that the *Miranda* rights have been waived."

Id. at 139-140.

The Court of Appeals first ascertained whether or not the police overreached or engaged in coercive tactics despite the defendant's weakened condition. After ruling that the police had not acted improperly, the Court of

Appeals shifted its analysis:

> "Because a waiver may very well be voluntary (that is, unforced) and yet given without a knowing and intelligent waiver of *Miranda* rights, it is not enough for us to find that [the defendant] voluntarily waived his rights. We must also determine whether the waiver was knowing and intelligent. Unlike the issue of voluntariness, police overreaching (coercion) is not a prerequisite for finding that the waiver was not knowingly and intelligently made."

Id. at 142.

Petitioner offers the Court a potential solution to the problem of determining a Due Process violation where the administration (or failure to administer) *Miranda* rights do not necessarily determine a confession's constitutional voluntariness. Where police have administered *Miranda* rights to a suspect, without coercion, the defendant should bear the burden of proving, by a preponderance of the evidence, that the confession was involuntary because of his diminished faculties at the time of his confession. Where the police failed to administer *Miranda* rights, or employ coercive means to attain a confession, the government should bear the burden of proving, beyond a reasonable doubt, that the confession was voluntary.

The case law illustrates the need to change the current *Miranda* regime. *Miranda*'s progeny shows that some sort of prophylactic rule is necessary to avoid having appellate courts determine the "legal" issue of a confession's voluntariness. *Connolly* shows how reluctant the Court is to

deviate from the prophylactic rule. Here, the rule justified a counterintuitive conclusion that an extremely mentally deranged person, who would be unable to make a valid contract, somehow understood the extreme consequences of relinquishing his Fifth Amendment rights. On the other hand, where "voluntariness" is a serious issue, this Court has had no choice but to stretch, with some philosophical abandon, the parameters of "coerciveness", in order to explain how a confession's "voluntariness" was sabotaged by police actions. This is shown in the *Miller* case where, after a valid and well understood *Miranda* waiver, the common practice of police misrepresentation of facts to the defendant could possibly rise to the level of "inherent" constitutional coercion.

The *Miranda* rule came into effect in order to obviate the need for the three-part voluntary Due Process Analysis, as used in the *Townsend v. Sain* case. However, the "totality of the circumstances" test reiterated in *Moran v. Burlen* has, in effect, caused a regression, and courts have reverted to the old test. The Fourth Circuit's *Cristobel* case illustrates this. The Fourth Circuit analyzes *Cristobel* in a manner that mimics pre-*Miranda* cases, so much so that, absent the citations, it would be hard to believe that this is a post-*Miranda* case.

Petitioner offers the following illustrations in support of his proposition. Again, in *Fulminate* , a jailhouse paid informant offered to help the defendant escaped certain harm (as a child abuser) if the defendant would confess to him. Under the proposed analysis, since this would be an un-*Mirandized* confession, the government would have to prove, beyond a reasonable doubt, that the confession was voluntary, a difficult standard to attain on these facts. Similarly, if the rule were applied in *Missouri v.*

Seibert, the case where the police employed the two-stage interrogation technique, a defendant, unfettered by the need to explain a valid *Miranda* waiver, would still be free to argue, correctly, that the second confession was involuntary.

The defendant could still argue that, due to the coercive police interrogation, he confessed and he cannot reasonably believe that he can avail of constitutional rights read to him soon after his confession.

The advantage to the scheme proposed by the petitioner is that it employs an easy prophylactic test for trial courts to measure a confession's validity on a case by case basis while still retaining the "essence" of the constitutional inquiry: Whether the defendant's waiver of constitutional rights is truly knowing and willing. This scheme would retain, as the Court pointed out in *Rochin v. California*, "the community's sense of fair play and decency." Petitioner asks for the opportunity to draw from the well of fair play and decency and have the chance to show that he could not have properly understood his *Miranda* rights because, at the time that the police told him his rights, he was too drunk.

CONCLUSION

For the reasons set forth above, the petitioner respectfully requests that the Writ of Certiorari be granted.

Respectfully Submitted
ELBERT LEON GRAHAM, JR.,

Roland M.L. Santos, Esquire
52 East Market St.
Harrisonburg, Virginia 22801
540/434-2211
Counsel for Petitioner